COLSF 9.1 VI

Ken Eikenberry
ATTORNEY GENERAL OF WASHINGTON
Ecology Division • 4407 Woodview Drive S.E. • QA-44 • Olympia, WA 98504-8077 • Fax (206) 438-7743

July 12, 1991

James Emacio
Deputy Prosecuting Attorney
City-County Public Safety Bldg.
W. 1100 Mallon Avenue
Spokane, WA 99260

Re: Institutional Controls for Colbert Landfill - Authority for County Drilling Restrictions

Dear Jim:

I am writing to you in response to your letter of May 29, 1991, in which you raised the issue of whether the County has authority to restrict drilling in contaminated areas, such as the area downgradient from the Colbert Landfill. Your opinion is that such a restriction would conflict with the state water code, which authorizes groundwater withdrawals pursuant to a permit from Ecology. Withdrawals for specified uses and requiring less than 5,000 gallons per day are exempted from the permit requirement.

In earlier correspondence, you noted that Article XI, Section 11 of the State Constitution provides the power to make and enforce all such police power, sanitary, and other regulations as are not in conflict with the general laws. This provision is implemented by RCW 36.32.120(7), which uses virtually identical language as the State Constitution. I agree with your assertion that the pivotal language at issue is "not in conflict with general laws." However, for the reasons set forth below, I do not believe that a County ordinance which restricts drilling in known contaminated areas would conflict with the state water code.

In discussing the issue of preemption, I would note that courts will not find preemption unless there is a clear intent by the legislature to preempt the field or the state and local requirements are in such direct conflict that they cannot be reconciled. Kennedy v. City of Seattle, 94 Wn. 2d 376, 383-384, (1980); Second Amendment Foundation v. City of Renton, 35

Wn. App. 583, 587-588, (1983). Courts will not interpret a statute as depriving a municipality of the power to legislate on particular subject matters unless that clearly is the legislative intent. Southwick, Inc. v. City of Lacey, 58 Wn. App. 886, 891-892 (1990); Second Amendment Foundation v. City of Renton, supra at 588. The regulation of a particular subject matter by the state does not divest a local government of authority if there is room for concurrent jurisdiction and there is no legislative intent to preempt the field. Southwick, Inc. v. City of Lacey, supra ; City of Seattle v. Shin, 50 Wn. App. 218, 220 (1988). Local ordinances are only preempted to the extent that there is an actual conflict with state requirements. State v. Mason, 34 Wn. App. 514, 521 (1983).

It appears to me that there is room for local regulation of drilling under the primary water resource laws, Ch. 90.03 RCW, 90.44 RCW, and 90.54 RCW for purposes other than resource allocation. These chapters regulate the allocation and uses of water resources, but do not convey title to any particular waters of the state. Moreover, the allocation of water resources is made in the context of other regulatory programs which address water quality concerns. See e.g., RCW 90.54.140 (requiring affected local agencies to "explore all possible measures for the protection" of sole source aquifers). Thus, I do not believe that a permit to appropriate groundwater conveys a right to drill in areas where contamination could pose a threat to human health or the environment. The police powers granted to counties under Article XI, Section 11 and RCW 36.32.120(7) are intended to permit regulation of such threats. I do not believe that the legislature intended the water code to preclude local government from preventing access to contamination.

As evidence of the lack of any preemptive intent, Ecology's regulations support the authority of local governments to restrict drilling. WAC 173-160-205 regulates the location of well sites. Public water supply wells must obtain approval from the state or local health authorities. WAC 173-160-205(1). Individual wells may not be located within certain distances from potential sources of contamination. The minimum distances are to be set by "local and state health regulations." WAC 173-160-205(2). Wells are prohibited within 1,000 feet of solid waste landfills. Id.

Moreover, WAC 173-160-095 provides that local governments may adopt more stringent well construction standards. Thus, local governments may adopt more stringent location standards than those included in WAC 173-160-205. These regulations indicate that Spokane County has authority to adopt locational restrictions on well drilling, such as prohibitions on drilling in a known area of contamination, like the area downgradient from the Colbert Landfill.

Additionally, I disagree with your conclusion that the water code leaves the County without authority to regulate drilling by domestic users of less than 5,000 gallons per day. RCW 90.44.050 exempts such users from the requirement to obtain a permit from Ecology to appropriate such small amounts. However, this exemption does not exempt the users from the well construction laws and thereby does not foreclose regulation of such drilling for other purposes, such as protection of public health. Even if the water code had a preemptive effect which foreclosed Spokane from regulating persons with a permit to appropriate groundwater, Spokane would retain its police power authority over persons not covered by the permit system.

For the foregoing reasons, I believe that Spokane County has regulatory authority to restrict drilling in areas where contamination from the Colbert Landfill has migrated. The opinions expressed here are my own and do not constitute a formal opinion of the Attorney General's Office. If you wish to discuss this matter further, please feel free to call me.

Very truly yours,

JEFFREY S. MYERS
Assistant Attorney General
Ecology Division
(206) 459-6134

JSM/bw
T5/emacio.ltr

cc: Mike Kuntz